Office-Supreme Court, U.S.
FILED
JUN 29 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1918

In the Supreme Court of the United States

October Term, 1980

PENNSYLVANIA GAS & WATER COMPANY,
Petitioner

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent

and

WALTER W. COHEN, CONSUMER ADVOCATE OF PENNSYLVANIA,
Respondent

[No. 278 January Term, 1978]

BRIEF OF THE CONSUMER ADVOCATE OF PENNSYLVANIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WALTER W. COHEN
NORMAN JAMES KENNARD
Office of Consumer Advocate
1425 Strawberry Square
Harrisburg, PA 17120
(717) 783-5048
Attorneys for Respondent

ANDREW M. HERMANN
On the Brief

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

Counter-Statement of Questions Presented and List of All Parties

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether the state's highest court failed to review and resolve all constitutional issues presented by Petitioner's appeal?

II. If the state's highest court did fail to review all constitutional issues presented, whether such was a denial of the due process and equal protection clauses of the Fourteenth Amendment such that this Honorable Court should issue a writ of certiorari to review the judgment and opinion of the state's highest court?

LIST OF ALL PARTIES

Petitioner seeks review of the February 1, 1980 judgment and opinion of the Supreme Court of Pennsylvania in the case of *Pennsylvania Public Utility Commission v. Pennsylvania Gas & Water Co.*, No. 278 January Term, 1978. The parties to the proceeding below were Pennsylvania Gas & Water Company, Pennsylvania Public Utility Commission, Attorney General of the Commonwealth of Pennsylvania and Consumer Advocate of the Commonwealth of Pennsylvania.

TABLE OF CONTENTS

	PAGE
Counter-Statement of Questions Presented	i
List of all Parties	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	2
Jurisdiction	2
Constitutional Provision Involved	3
Counter-Statement of the Case	4
Reasons for Denying the Writ:	
I. The Pennsylvania Supreme Court did not fail to consider the Company's rate of return arguments, but, in fact, considered and rejected them as devoid of merit	6
II. The Pennsylvania Supreme Court correctly stated the standard of judicial review applicable to administrative agency findings	8
III. The petition should be denied as inconsistent with principles of federalism or, in the alternative, as lacking special and important reasons which require review on writ of certiorari	10
Conclusion	13

TABLE OF AUTHORITIES

CASES:

Allen v. McCury, 49 U.S.L.W. 4015 (December 9, 1980) 11

Ben Avon Boro v. Ohio Valley Water Co. (No. 1), 260 Pa. 289, 103 A. 744 (1918) 8, 9

Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969) 11

Cheltenham & Abington Sewerage Co. v. Pennsylvania Public Utility Commission, 344 Pa. 366, 25 A.2d 334 (1942) 13

Crowell v. Benson, 285 U.S. 22 (1932) 9

Deane Hill Country Club Inc. v. City of Knoxville, 379 F.2d 321 (6th Cir. 1967), cert. denied, 389 U.S. 975 (1967) 11

Donaldson v. United States, 400 U.S. 517 (1971) 12

Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944) 9

Federal Power Comm'n v. National Gas Pipeline Co., 315 U.S. 575 (1942) 9

Hanna v. Plumer, 380 U.S. 460 (1965) 12

Kossick v. United Fruit Co., 365 U.S. 731 (1961) 12

Lancaster Ice Mfg. Co. v. Pennsylvania Public Utility Commission, 185 Pa. Superior Ct. 615, 138 A.2d 262 (1958) 13

Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920) 8, 9

Pennsylvania Gas & Water Co. v. Pennsylvania Public Utility Commission, 33 Pa. Commonwealth Ct. 143, 381 A.2d 996 (1977) 2, 6

Pennsylvania Public Utility Commission v. Pennsylvania Gas & Water Co., —— Pa. ——, 424 A.2d 1213 (1980) 2, 7, 10

Rice v. Sioux City Memorial Cemetery, Inc., 347 U.S. 70 (1955) 11

St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936) 9

United States v. Raddatz, 447 U.S. 667 (1980) 9, 10

Yellin v. United States, 374 U.S. 109 (1963) 12

Younger v. Harris, 401 U.S. 37 (1971) 10, 11

CONSTITUTIONAL PROVISIONS:

U.S. Const., Amend. XIV, §1 3

STATUTES:

28 U.S.C.A. §1257(3) 2

66 Pa. C.S.A. §1308 12

71 P.S. §309-4(a) (Section 904-A of P.L. 177, No. 175, known as "The Administrative Code of 1929" as amended by Act 161 of 1976) 4

RULES OF COURT:

U.S. Supreme Court Rule 17, 28 U.S.C.A. (1981 Supp.) 11, 12

No. 80-1918

In the
Supreme Court of the United States

October Term, 1980

PENNSYLVANIA GAS & WATER COMPANY,
Petitioner

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent

and

WALTER W. COHEN, CONSUMER ADVOCATE OF PENNSYLVANIA,
Respondent

[No. 278 January Term, 1978]

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY THE CONSUMER ADVOCATE OF PENNSYLVANIA

Respondent, Walter W. Cohen, Consumer Advocate of Pennsylvania, respectfully prays that this Honorable Court deny the petition for writ of certiorari to review the judgment and opinion of the Supreme Court of Pennsylvania entered on February 1, 1980, in the case of *Pennsylvania Public Utility Commission v. Pennsylvania Gas & Water Co.*, No. 278 January Term, 1978.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported at Pa. , 424 A.2d 1213 (1980), and together with concurring opinions appears as Appendix A to the petition for writ of certiorari ("petition"). Notice of denial of the applications for reargument appears as Appendix B to the petition. The opinion of the Commonwealth Court of Pennsylvania ("Commonwealth Court") is reported at 33 Pa. Commonwealth Ct. 143, 381 A.2d 996 (1977), and appears as Appendix C to the petition.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under Title 28 of the United States Code at Section 1257 (3). 28 U.S.C.A. §1257(3).

CONSTITUTIONAL PROVISION INVOKED

U.S. Constitution, Amendment XIV, Section 1:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COUNTER-STATEMENT OF THE CASE

Petitioner, Pennsylvania Gas & Water Company ("PG&W" or "Company"), is a public utility providing water service in Northeastern Pennsylvania subject to regulation by the Pennsylvania Public Utility Commission ("PUC"), an administrative agency of the Commonwealth of Pennsylvania. Respondent, Walter W. Cohen, is the Consumer Advocate of Pennsylvania with the statutory duty and responsibility "to represent the interest of [utility] consumers . . . before any court . . . whether on appeal or otherwise. . . ." 71 P.S. §309-4(a) (Section 904-A of P.L. 177, No. 175, known as "The Administrative Code of 1929" as amended by Act 161 of 1976).

On January 17, 1975, PG&W filed with the PUC for authority to increase its annual operating revenues by $2,643,212 based upon a test year ending September 30, 1974. By order entered March 25, 1975, the PUC permitted $1,321,606 of the requested amount to become effective ("Step I") and suspended operation of the remaining rate request ("Step II"). On that date the PUC also instituted an investigation of the entire $2,643,212 proposed increase at docket R.I.D. 209. The PUC's final order of July 7, 1976 allowed the Company to continue collection of the Step I increase, but denied the Step II increase.

PG&W petitioned the Commonwealth Court for review of the PUC's order, contending that the rate base (valuation) and rate of return findings were confiscatory. The Commonwealth Court reversed the PUC as to rate

base, holding that Pennsylvania law required greater recognition of reproduction value in valuation of PG&W's assets than was allowed by the PUC. The case was remanded to the PUC "with an order directing the PUC to enter an order dismissing the complaints and allowing, as permanent rates, each of the rates proposed in the supplements filed by PG&W." Petition at Appendix C, pp. A38-A39.

In compliance with the Commonwealth Court's order, the PUC, on April 27, 1978, approved a recoupment plan filed by PG&W. The plan consisted of a tariff surcharge designed to collect revenues as if the PUC had approved the full Step II increase originally. Thus, PG&W has realized the total rate increase requested at R.I.D. 209.

On January 20, 1978, the PUC petitioned the Supreme Court of Pennsylvania for allowance of appeal from the Commonwealth Court's opinion below. By opinion dated February 1, 1980, the Court held that the PUC had committed no reversible error and that its order should be reinstated. PG&W filed an application for reargument which was denied by the Pennsylvania Supreme Court on February 18, 1981. Petition at Appendix B. On March 21, 1980 the PUC opened an investigation, docketed at C-80031919 (R.I.D. 72 and 209), into the propriety of refunds for revenues collected pursuant to the Step II recoupment surcharge.

On May 15, 1981 PG&W filed a petition for writ of certiorari with this Honorable Court. This brief is filed in response thereto.

REASONS FOR DENYING THE WRIT

I. The Pennsylvania Supreme Court Did Not Fail To Consider the Company's Rate of Return Arguments, but, in Fact, Considered and Rejected Them as Devoid of Merit

PG&W has asserted that the Pennsylvania Supreme Court refused to permit judicial review of the Company's allegation that the rate of return set by the PUC was confiscatory and that such "refusal" was a deprivation of Petitioner's constitutional right to due process and equal protection. Petition at 7. However, a review of the pleadings filed below indicates that the Pennsylvania Supreme Court did review the issue and rejected the Company's allegation on the merits.

In its brief filed before the Commonwealth Court, PG&W conceded the justness of the PUC's findings with respect to capital structure, the cost of debt and the cost of preferred stock, and expressly declined to appeal therefrom. *Pennsylvania Gas & Water Co. v. Pennsylvania Public Utility Commission*, 33 Pa. Commonwealth Ct. 143, 381 A.2d 996 (1977), Brief for Petitioner at 32. The Company did argue that the cost of common equity found just and reasonable by the PUC was too low. According to PG&W, the overall cost of capital should have been set at 9.01%, by wholesale adoption of the Company's testimony, in contrast to the 8.53% cost found reasonable by the PUC. *Id.*, Brief for Petitioner at 31-33. The Commonwealth Court reversed the PUC on other grounds.

In its brief filed before the Pennsylvania Supreme Court on appeal, PG&W again raised the rate of return issue, arguing that, not only must a reproduction cost standard be employed for valuation of PG&W's rate base, but that a marketplace rate of return must be strictly applied thereto. *Pennsylvania Public Utility Commission v. Pennsylvania Gas & Water Co.,* Pa. , 424 A.2d 1213 (1980), Brief for Appellee at 64-71. The Pennsylvania Supreme Court held that as to all the arguments raised, the PUC's order was lawful, constitutional and supported by sufficient evidence.

> . . . Based on our analysis of the arguments presented to this Court on the merits of the rate increase, we find that the order of the PUC is supported in law and by sufficient facts. Accordingly, we reinstate the order of the PUC entered below.

Id. 424 A.2d at 1222. Thus, the Company's arguments regarding the proper rate of return were raised on appeal and were reviewed and dismissed by the Pennsylvania Supreme Court on the merits.

Despite the fact that the rate of return issue was raised in the Company's brief and dismissed by the Pennsylvania Supreme Court, PG&W, in its application for reargument, maintained that the issue had not been reviewed and raised the identical procedural due process issue presented to Your Honors in the instant petition. Application for Reargument at 4-5. The Pennsylvania Supreme Court denied the application *per curiam.* Petition at Appendix B. The *per curiam* denial of PG&W's application is manifest evidence that the court considered the rate of return issue already adjudicated and resolved by the opinion and judgment issued February 1, 1980.

Thus, there is no basis in fact for PG&W's allegation that its right of judicial review was impaired. The rate of return issue was raised, reviewed and dismissed on the merits.

II. The Pennsylvania Supreme Court Correctly Stated the Standard of Judicial Review Applicable To Administrative Agency Findings

---

PG&W has claimed a constitutional entitlement to "'a fair opportunity for submitting that issue [of confiscation] to a judicial tribunal for determination upon its own *independent judgment as to both law and facts*'. . . . (Emphasis added.)" Petition at 6, *citing Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289 (1920) [hereinafter cited as *Ben Avon*]. Petitioner misconceives both the holding in *Ben Avon* and the standard of judicial review applicable to administrative agency findings.

In *Ben Avon Boro. et al. v. Ohio Valley Water Co. (No. 1)*, 260 Pa. 289, 103 A. 744 (1918), the Pennsylvania Supreme Court concluded that the Pennsylvania Public Service Commission's findings with respect to the rate request of the Ohio Valley Water Company were supported by competent evidence tending to sustain the Commission's conclusion and that, therefore, the Commission order should be upheld without further judicial scrutiny. "[T]he inquiry by the court is not, whether the order is such as the court would have made. . . . [T]he Court is not to substitute its judgment as to rates or values, for that of the commission." *Id.* at 300, 103 A. at 746. On appeal to this Honorable Court, Mr. Justice Reynolds

speaking for the majority overruled the Pennsylvania Supreme Court and found that the Ohio Valley Water Company was entitled to a *de novo* "independent" review of the facts by Pennsylvania appellate authorities. *Ben Avon, supra* 289.

The language from *Ben Avon* cited in the petition for certiorari does not address, as asserted by Petitioner, the issue of whether judicial review is constitutionally mandated. *Ben Avon* deals only with the standard of judicial review applicable upon appeal of an agency finding and, hence, is irrelevant to the central issue presented here.

Moreover, the *Ben Avon* standard of judicial review has been substantially eroded, if not implicitly overruled, by subsequent case law. In *Federal Power Comm'n v. National Gas Pipeline Co.*, 315 U.S. 575 (1942), this Court adopted the standard of review in effect today—conclusions of fact will not be subjected to further judicial scrutiny where supported by "substantial evidence." *Id.* at 586 and 596; *See also Federal Power Commn. v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). The genesis of the present day standard is Mr. Justice Brandeis' eloquent dissents in *Ben Avon, supra* at 292, *Crowell v. Benson*, 285 U.S. 22, 65 (1932), and *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73 (1936). As Mr. Justice Marshall concluded in *United States v. Raddatz*, 447 U.S. 667, 694 (1980) (dissenting on other grounds):

> It may fairly be said that in certain respects at least, Mr. Justice Brandeis' views in Crowell and St. Joseph Stock Yards have become the law. It can no longer be claimed that a person is entitled under Art. III or the Due Process Clause to a *de novo* judicial

> determination of the facts in every case that implicates constitutional rights.

Id. at 710. In the arena of utility rate regulation and issues of confiscation arising therefrom, this Court has consistently affirmed administrative decisions which are supported by sufficient facts.

The Pennsylvania Supreme Court below correctly stated the scope of its review when it concluded that the PUC's order in the rate case at R.I.D. 209, "is supported in law and by sufficient facts" and, therefore, should not be reviewed upon a writ of certiorari. *Pennsylvania Public Utility Commission v. Pennsylvania Gas & Water Co., supra,* 424 A.2d at 1222.

III. The Petition Should Be Denied as Inconsistent With Principles of Federalism or, in the Alternative, as Lacking Special and Important Reasons Which Require Review on Writ of Certiorari

---

The Supreme Court of Pennsylvania has ruled upon the merits of Petitioner's claims of confiscation and dismissed them. Now PG&W by its petition is seeking the approbation of this Court to relitigate the issue. Such a procedure is inconsistent with our system of federalism. As Mr. Justice Black stated for the majority in *Younger v. Harris,* 401 U.S.37, 43-44 (1971):

> The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain.

> . . . What the concept [of federalism] does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

In a very recent opinion, the Honorable Court reaffirmed the need to "promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen v. McCury*, 49 U.S.L.W. 4015, 4017 (December 9, 1980). "[F]ederal courts most assuredly do not provide a forum in which disgruntled parties can re-litigate [constitutional] claims which have been presented to and decided by state courts." *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321, 325 (6th Cir. 1967), *cert. denied*, 389 U.S. 975 (1967); *Accord, Brown v. Chastain*, 416 F.2d 1012, 1014 (5th Cir. 1969). The constitutional issue has been fully adjudicated below and should not be disturbed.

However, even if this Honorable Court agrees with Petitioner that the allegation of confiscation was not decided by Pennsylvania appellate authorities, the issues raised by Petitioner here are unworthy of review by Your Honors. "A review on *writ of certiorari* is not a matter of right, but of judicial discretion, and *will be granted only when* there are *special and important reasons* therefor. (Emphasis added.)". U.S. Supreme Court Rule 17, 28 U.S.C.A. (1981 Supp.) *See Rice v. Sioux City Memorial Cemetery, Inc.*, 347 U.S. 70, 74 (1955). The immediate case presents no special *and* important reasons for the granting of certiorari, such as: "constitutional ques-

tions of continuing importance," *Yellin v. United States,* 374 U.S. 109, 111 (1963); "important questions relating to the administration and enforcement of [federal] law," *Donaldson v. United States,* 400 U.S. 517, 522 (1971); "novel questions as to the interplay of state and [federal] law," *Kossick v. United Fruit Co.,* 365 U.S. 731, 733 (1961); or a "threat to the goal of uniformity of federal procedure," *Hanna v. Plumer,* 380 U.S. 460, 463 (1965). The immediate case is not special and important within the meaning of Rule 17 and, therefore, a writ of certiorari should not issue.

Moreover, PG&W has collected from ratepayers the *full* amount of the $2,643,212 rate increase requested at R.I.D. 209. Upon remand to the PUC by Commonwealth Court, the PUC allowed PG&W to place into effect a recoupment surcharge designed to collect revenues as if the PUC had approved the full Step II increase originally. A public utility may not be awarded a greater rate increase than originally proposed. *See generally* 66 Pa. C.S.A. §1308. Where, as here, the Company has received the full amount of the increase requested, a higher tariff rate cannot be sought, absent the filing of another new request for rate relief. Therefore, even if this Court provides the remedy requested by Petitioner *and* Pennsylvania appellate authorities ultimately reverse the PUC's rate of return findings, PG&W cannot collect a higher tariff rate from ratepayers.

The sole manner in which PG&W *might* be injured by the alleged lack of appellate review is only *if* the PUC at some future date orders a full refund to consumers of the Step II recoupment surcharge previously collected by the Company. That the PUC will order a full refund is, at this juncture highly speculative and, indeed, such a re-

fund order may never occur. Under Pennsylvania law refunds are equitable in nature and a matter of administrative discretion. *Cheltenham & Abington Sewerage Co. v. Pennsylvania Public Utility Commission,* 344 Pa. 366, 372, 25 A.2d 334, 337-38 (1942); *Lancaster Ice Mfg. Co. v. Pennsylvania Public Utility Commission,* 185 Pa. Superior Ct. 615, 627, 138 A.2d 262, 267-68 (1958). Thus, it is not at all clear that PG&W will be prejudiced by the alleged lack of appellate review.

CONCLUSION

For all the foregoing reasons a writ of certiorari should not issue.

Respectfully submitted,

WALTER W. COHEN
Consumer Advocate
NORMAN JAMES KENNARD
Assistant Consumer Advocate
Attorneys for Respondent

DATED: July 1, 1981